03-5554 (14)

No. _____

FILED
JUL 22 2003
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

LARRY D. HIIBEL, Petitioner

v.

The SIXTH JUDICIAL DISTRICT COURT of the STATE OF NEVADA,
in and for the COUNTY OF HUMBOLDT, and the
Honorable Richard A. Wagner, District Judge, Respondents, and
THE STATE OF NEVADA, Real Party in Interest.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner Larry D. Hiibel, asks leave to file the accompanying petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

In the Justice's Court of Union Township, Humboldt County, State of Nevada, petitioner requested appointed counsel to represent him in misdemeanor proceedings at the expense of the State of Nevada, in that he was without means to employ counsel. On June 19, 2000, the Justice of the Peace granted Mr. Hiibel's request and ordered that the Nevada State Public Defender be appointed to represent him at the expense of the State of Nevada. Although not formally entitled "leave to proceed *in forma pauperis*," it would appear that the court granted Mr. Hiibel's request due to his indigency at that time. In accordance with local practice, the Nevada State Public Defender continued to represent Mr. Hiibel through all appeal proceedings

(2)

without any further declaration of indigency. A copy of the Petition and order may be found at Appendix B.

Petitioner's affidavit or declaration in support of this motion is also attached hereto.

DATED this 22 day of July, 2003.

by: _____

JAMES P. LOGAN, Jr.
Counsel of Record
NEVADA STATE PUBLIC DEFENDER
511 East Robinson Street, Suite 1
Carson City, Nevada 89701
(775) 687-4880

Attorney for Petitioner

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Larry Dudley Hiibel, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ N/A	$ 0	$ N/A
Self-employment	$ 500	$ N/A	$ 500	$ N/A
Income from real property (such as rental income)	$ N/A	$ N/A	$ N/A	$ N/A
Interest and dividends	$ N/A	$ N/A	$ N/A	$ N/A
Gifts	$ N/A	$ N/A	$ N/A	$ N/A
Alimony	$ N/A	$ N/A	$ N/A	$ N/A
Child Support	$ N/A	$ N/A	$ N/A	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ 312.00	$ N/A	$ 312.00	$ N/A
Disability (such as social security, insurance payments)	$ N/ A	$ N/A	$ N/A	$ N/A
Unemployment payments	$ N/A	$ N/A	$ N/A	$ N/A
Public-assistance (such as welfare)	$ N/A	$ N/A	$ N/A	$ N/A
Other (specify): _____	$ N/A	$ N/A	$ N/A	$ N/A
Total monthly income:	$ 812.00	$ N/A	$ N/A	$ N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
			$
			$

4. How much cash do you and your spouse have? $ 10.00
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A	N/A	$ N/A	$ N/a
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☒ Home
Value 3,000

☒ Other real estate
Value 30,000

☒ Motor Vehicle #1
Year, make & model 1988-GMC truck
Value $500

☒ Motor Vehicle #2
Year, make & model NZA 1990. $500 XXXX XX
Value $500

☐ Other assets
Description N/A
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ N/A	$ N/A
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
Mary Hiibel	daughter	25
Jude M. Hiibel	grand son	2

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☒ No Is property insurance included? ☐ Yes ☒ No	$ N/A	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 100	$ N/A
Home maintenance (repairs and upkeep)	$ 100	$ N/A
Food	$ 400	$ N/A
Clothing	$ 50	$ N/A
Laundry and dry-cleaning	$ 20	$ 20
Medical and dental expenses	$ 75	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 50	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ N/A	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ N/A	$ N/A
Life	$ N/A	$ N/A
Health	$ N/A	$ N/A
Motor Vehicle	$ 40	$ N/A
Other: _____	$ N/A	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ N/A	$ N/A
Installment payments		
Motor Vehicle	$ N/A	$ N/A
Credit card(s)	$ N/A	$ N/A
Department store(s)	$ N/A	$ N/A
Other: _____	$ N/A	$ N/A
Alimony, maintenance, and support paid to others	$ N/A	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 1,500	$ N/A
Other (specify): _____	$ N/A	$ N/A
Total monthly expenses:	$ 2,295	$ N/A

MONTHLY EXPENSE FOR CATTLE

Hay	$500
Vaccines	30
Fuel	200
tires	50
fencing	600
tools	100
misc.	50
TOTAL	$1,500/mth

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am indigent. I barely have enough money to pay for necessities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 15, 2003, 20__

SUBSCRIBED AND SWORN TO
BY Larry Dudley Hiibel
BEFORE ME THIS 15th DAY
OF July, 2003
Laura D. Lecumberry
NOTARY PUBLIC

Larry Dudley Hiibel
(Signature)

LAURA D. LECUMBERRY
Notary Public - State of Nevada
Appointment Recorded in Humboldt County
No: 99-37847-9 - Expires September 1, 2003

03-5554

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

LARRY D. HIIBEL, Petitioner

v.

The SIXTH JUDICIAL DISTRICT COURT of the STATE OF NEVADA, in and for the COUNTY OF HUMBOLDT, and the Honorable Richard A. Wagner, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Fourth and Fifth Amendments to the United States constitution bar the state from compelling people to identify themselves during a police investigation when someone has been seized upon less than probable cause?

PARTIES TO THE PROCEEDING

There are no parties to this matter other than those named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Larry D. Hiibel respectfully seeks certiorari to review the judgment of the Supreme Court of the State of Nevada which effectively affirmed his criminal conviction for resisting a public officer. This conviction was based upon Mr. Hiibel's refusal to identify himself. Mr. Hiibel previously filed a petition for a writ of certiorari in the Supreme Court of the State of Nevada seeking to establish as unconstitutional that portion of Nevada Revised Statute (NRS) 171.123 which requires individuals to identify themselves when they are seized by a police officer on less than probable cause. The Supreme Court of the State of Nevada ruled that the aforementioned statute was constitutional under the Fourth and Fifth Amendments to the United States Constitution.

OPINIONS BELOW

The December 20, 2002, opinion of the Supreme Court of the State of Nevada denying Mr. Hiibel's petition for a writ of certiorari is published at 59 P.2d 1201 (2002). Appendix A. The April 25, 2003, order of the Supreme Court of the State of Nevada denying rehearing is unpublished. Appendix F.

JURISDICTION

The opinion of the Supreme Court of the State of Nevada denying Mr. Hiibel's petition for a writ of certiorari was entered on December 20, 2002. On April 25, 2003, the Supreme Court of the State of Nevada denied Mr. Hiibel's timely petition for rehearing. Remittitur has been stayed pending this application for a writ of certiorari.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 of the United States Constitution provides, in pertinent part: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, ..."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ..."

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . ."

NRS 171.123 provides, in pertinent part:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
> . . .
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not a compelled to answer any other inquiry of any peace officer.

NRS 199.280 provides, in pertinent part:

> 1. A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished: . . .
> 2. Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

STATEMENT OF THE CASE

The Petitioner Larry D. Hiibel, was convicted in the justice court of Humboldt County, State of Nevada, of resisting a public officer in violation of NRS 199.280. The basis for this conviction was that Mr. Hiibel, during a Terry stop, had failed to identify himself to a police officer upon request. See Terry v. Ohio, 392 U.S. 1 (1968). Appendix C.

Mr. Hiibel unsuccessfully appealed this misdemeanor conviction to the district court in Humboldt County. Appendix D. Thereafter, Mr. Hiibel filed a petition for a writ of certiorari in the Supreme Court of the State of Nevada. In that petition, Mr. Hiibel requested that the court declare as unconstitutional that portion of NRS 171.123 which requires the person who is the subject of a Terry stop to identify himself or herself. Appendix G. In a split decision the Supreme Court of the State of Nevada upheld the constitutionality of the statute. Appendix A. Mr. Hiibel then filed a Petition for Rehearing. In that petition Mr. Hiibel claimed that the court should have analyzed the issue utilizing a Fifth Amendment analysis rather than a Fourth Amendment analysis. It was Mr. Hiibel's position in this petition that the court should have utilized a weighing analysis similar to this Court's analysis in California v. Beyers, 402 U.S. 424 (1971). Utilizing this analysis, Mr. Hiibel reasoned that the court

would find the statute unconstitutional. Appendix I. The Petition for Rehearing was denied without discussion. Appendix F.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In response to a call from police dispatch, Humboldt County Sheriff Deputy Lee Dove drove to the scene where a concerned citizen had observed someone striking a female passenger inside a truck. There, Deputy Dove spoke to the concerned citizen and was directed to a parked truck. When Deputy Dove approached the truck he noticed skid marks in the gravel, suggesting the truck had been parked in a sudden and aggressive manner. Deputy Dove saw the petitioner Larry D. Hiibel standing outside the truck and thought he was intoxicated based on his eyes, mannerisms, speech, and odor. Mr. Hiibel's minor daughter was in the passenger side of the truck. When Deputy Dove asked Mr. Hiibel to identify himself, Mr. Hiibel refused. Instead, Mr. Hiibel placed his hands behind his back and challenged the officer to take him to jail. Mr. Hiibel said he would cooperate but was unwilling to provide identification, because he did not believe he had done anything wrong. After eleven requests for identification, to no avail, Deputy Dove arrested Mr. Hiibel.

Mr. Hiibel was charged and found guilty of Resisting a Public Officer, a misdemeanor. Mr. Hiibel unsuccessfully appealed the case to the district court. Appendix A at 2-4.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. SPLIT OF AUTHORITY

There is a split of authority between circuits and among several states regarding the issue presented in this petition.

On three separate occasions the Ninth Circuit Court of Appeals has decided that a person being detained because of an articulable suspicion of criminal activity may refuse to identify himself or herself. Carey v. Nevada Gaming Control Bd., 279 F.3d 873 (9th Cir. 2002); Martinelli v. City of Beaumont, 820 F.3d 1491 (9th Cir. 1987); and Lawson v. Kolender, 658 F.2d 1362 (9th Cir. 1981), affirmed on other grounds Kolender v. Lawson, 461 U.S. 352 (1983). Similarly, in Richardson v. Bonds, 860 F.2d 1427, 1432 (7th Cir. 1988), the court stated that "it was clearly established that a private citizen could not be arrested for failing to identify himself." See also, Moya v. United States, 761 F.2d 322, 325 (7th Cir. 1984) (probable cause not established by failing to present identification to a police officer upon request by a law enforcement officer). The Eleventh Circuit Court of Appeals is in accord. United States v. Brown, 731 F.2d 1491, 1494 (11th Cir. 1984), modified on other grounds 731 F.2d 1505 (11th Cir. 1984) (per curiam). See also, Gaynor v. Rogers, 973 F.2d 1379 (8th Cir. 1992). Finally, the Texas federal district court made a similar ruling in Spring v. Caldwell, 561 F.Supp. 1223, 1229-30 (S.D. Tex. 1981), reversed on other grounds 692 F.2d 994 (5th Cir. 1982).

Several state courts are in accord with the above-referenced federal courts. See People v. DeFillippo, 262 N.W.2d 921 (Mich. 1977) reversed on other grounds, Michigan v. DeFillippo, 443 U.S. 31 (1979); People v. Berck, 300 N.E.2d 411, 414-16 (N.Y. 1973); State v. White, 640 P.2d 1061 (Wash. 1982); Burks v. State, 719 So.2d 29 (Fla.App. 2 Dist. 1998); State v. Hauan, 361 N.W.2d 336 (Iowa Ct.App. 1984).

The Tenth Circuit Court of Appeals seems to be on the opposite side of the issue. See Albright v. Rodriguez, 51 F.3d 1179, 1190 (10th Cir. 1995); Oliver v. Woods, 209 F.3d 1179, 1190 (10th Cir. 2000). State courts which seem to be in accord with this line of authority are State v. Flynn, 285 N.W.2d 710 (Wis. 1979); Jones v. Commonwealth of Virginia, 334 S.E.2d 536 (Va. 1985); People v. Evans, 689 N.E.2d 142 (Ill. 1997). In addition, while not addressing the precise issue presented in this petition, several courts have held the failure to identify oneself to a police officer a criminal act. See, Johnson v. State, 507 S.E.2d 13 (Ga.App. 1998); State v. George, 905 P.2d 626 (Id. 1995); Township of East Brunswick v. Malfitano, 260 A.2d 862 (N.J. App. Div. 1970); State v. Andrews, 934 P.2d 289 (N.M. App. 1997).

It is plainly evident from the above discussion that there is a clear split of authority among the federal circuit courts and among the states which warrants this Court's intervention to resolve the split of authority.

B. IMPORTANT ISSUE

The issue presented in this petition has been considered important enough in the past to come before this Court on two separate occasions. However, this Court found it unnecessary to answer this precise question and resolved both cases on other grounds. Brown v. Texas, 443 U.S. 47 (1979) and Kolender v. Lawson, 461 U.S. 352 (1983). After two decades of the litigation which has produced the split of authority described above it is now time to resolve the issue once and for all.

Although this Court did not resolve the issue presented by this petition, the court has not been silent on the issue.

In Terry v. Ohio, 392 U.S. 1, 34 (1968), Justice White explained in his concurring opinion that "of course, the person stopped is not obligated to answer, . . .

and refusal to answer furnishes no basis for an arrest, although it may alert the officers to the need for continued observation."

In Berkemer v. McCarty, 468 U.S. 420, 439 (1984), while discussing Terry stops, the court stated:

> [T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' Ibid. (quoting Terry v. Ohio, supra, at 29, 20 L.Ed.2d 889, 88 S.Ct. 1868). Typically, this means that the officer must ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obligated to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.

Emphasis added.

In his concurring opinion in Michigan v. DeFillippo, 443 U.S. 31, 44 (1979), Justice Blackmun stated:

> Furthermore, while a person may be briefly detained against his will on the basis of reasonable suspicion 'while pertinent questions are directed to him . . . the person stopped is not obligated to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest . . . .' Terry v. Ohio, supra, at 34, 20 L.Ed.2d 889, 88 S.Ct. 1868, 44 Ohio Ops.2d 383 (White, J., concurring). In the context of criminal investigation, the privacy interest in remaining silent simply cannot be overcome at the whim of any suspicious police officer. "[W]hile the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.' Davis v. Mississippi, 394 U.S. 721, 727 n.6, 22 L.ed.2d 676, 89 S.Ct. 1394 (1969).

In note 6 in Davis v. Mississippi, 394 U.S. 721, 727 (1969), the court stated:

> The State relies on various statements in our cases which approve general questioning of citizens in the course

> of investigating a crime. See Miranda v. Arizona, 384 U.S. 436, 477-78, 16 L.Ed2d 694, 725, 726, 86 S.Ct. 1602, 10 ALR3d 974 (1966); Culombe v. Connecticut, 367 U.S. 568, 635, 6 L.Ed.2d 1037, 1076, 81 S.Ct. 1860 (concurring opinion) (1961). But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.

Finally, Justice Brennan, in his concurring opinion in Kolender v. Lawson, 461 U.S. 352, 364, 365 (1983), while he was discussing Terry stops, stated:

> For precisely that reason, the scope of seizures of the person on less than probable cause that Terry permits is strictly circumscribed to limit the degree of intrusion they cause. Terry encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him.

Emphasis added.

The issue which is the subject of this petition has arisen in civil rights litigation. Courts have dismissed claims based upon this issue as not being "clearly established law". See, Risbridger v. Connelly, 275 F.3d 565 (6th Cir. 2001); Albright v. Rodriguez, 51 F.3d 1531 (10th Cir. 1995). If there is a right to refuse to identify oneself to a police officer, no citizen of this country should spend one minute in jail for exercising that right under the United States Constitution. On the other hand, if there is no such right, no police officer should suffer the unpleasantness of civil litigation for enforcing a law that the officer has sworn to uphold. It is time for the issue to be resolved.

In Nevada the situation is completely untenable. If a police officer arrests someone for refusing to identify himself or herself, that officer is upholding the law as determined by the state's higher court. However, that officer will be sued in federal court and will lose! Police officers should not be forced to put their personal fortune at risk for enforcing a law which they have sworn to uphold. A similar situation is present in those states within the Ninth Circuit which have laws similar to Nevada. It is time to resolve this issue once and for all.

CONCLUSION

As the law now stands in some jurisdictions, a person under a shadow of suspicion, who has not committed any crime, can be approached by the police, do absolutely nothing, and yet be arrested, convicted and incarcerated. This issue goes to the very nature of the kind of society in which we wish to live: it is inimical to a free society that mere silence can lead to imprisonment.

Based upon the foregoing, because there is a split of authority on the matter at hand and the petition raises an important issue present throughout the country, the petition should be granted and the writ issue.

RESPECTFULLY SUBMITTED this 22 day of July, 2003.

by: _____

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